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No. 85-9

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

THE STATE OF TEXAS,
Petitioner,
v.
UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, and
GREYHOUND LINES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION OF RESPONDENT GREYHOUND LINES, INC.

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QUESTION PRESENTED

Whether the Fifth Circuit was correct when it ruled—in agreement with each of the other Circuits previously presented with the same question—that the Interstate Commerce Commission's interpretation of Section 16(g) of the Bus Regulatory Reform Act of 1982 is neither arbitrary nor capricious, but rather is a permissible reading of the Act by the expert agency charged with its implementation.

STATEMENT REQUIRED BY RULE 28.1

Respondent Greyhound Lines, Inc., is a wholly-owned subsidiary of The Greyhound Corporation. A list of the principal subsidiaries of The Greyhound Corporation and the subsidiaries and affiliates of Greyhound Lines, Inc., appears in an Appendix hereto.

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STATEMENT OF THE CASE

This case concerns a unanimous decision by the United States Court of Appeals for the Fifth Circuit (Rubin, Tate and Hill, JJ.) in which the court affirmed the granting by the Interstate Commerce Commission ("ICC" or the "Commission") of a petition by Respondent Greyhound Lines, Inc. ("Greyhound") to discontinue intrastate bus service over certain routes in Texas. The dispute began on December 17, 1982, when Greyhound filed a request pursuant to the provisions of the Bus Regulatory Reform Act of 1982 (the "Act" or "BRRA")[1] with the

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[1] Pub. L. No. 97-261, 96 Stat. 1102 (codified at 49 U.S.C. § 10935). *See* Pet. App. D-1 to D-5.

Railroad Commission of Texas ("RCT") to discontinue service over a single route between Houston and San Antonio and to 46 off-route "service points" on nine other routes in the State. Greyhound submitted economic data in support of its discontinuance request, and the RCT held a series of hearings around the State. The RCT hearing examiner ultimately issued a proposed decision denying Greyhound's application, to which Greyhound filed exceptions but which the RCT nevertheless adopted in a final order dated May 16, 1983. That final order denied Greyhound's discontinuance application completely; Greyhound's subsequent request to the RCT for a rehearing was likewise denied.

As contemplated under Section 16 of the BRRA, Greyhound then filed a petition with the ICC requesting permission to exit from the service that the RCT had refused to let Greyhound discontinue. Greyhound again supported its petition with data evidencing that its costs in providing the bus service over the route in issue exceeded the revenues earned from such service. Greyhound also submitted evidence that alternative bus service was available at or near all of the service points at which it sought to discontinue its own service.[2] Several parties, including the RCT, protested Greyhound's petition to the ICC; these protests were in turn rebutted by Greyhound. On December 12, 1983 the ICC, upon finding that "[p]ersons objecting to [Greyhound's application] have not shown either that the discontinuance is not consistent with the public

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[2] In point of fact, a new carrier has already received permission from the ICC to commence service between Houston and San Antonio, *see* I.C.C. Decision No. MC-171844 (February 1, 1984), and has in fact been in operation over that route since April 2, 1984. As a result, all but two of the service points previously served by Greyhound on its now-discontinued Houston-San Antonio route have received replacement bus service that traverses the same route. And even the two remaining off-route service points have sufficient alternate bus service available, either directly from other carriers or through a nearby town.

interest or that continuing the transportation, without the proposed discontinuance, will not constitute an unreasonable burden on interstate commerce" (Pet. App. C-23), granted Greyhound permission to discontinue service over the Houston-San Antonio route and to 26 of the 46 service points. As to the remaining off-route service points, however, the ICC found that sufficient alternate bus service was not available and therefore denied Greyhound's application to cease serving those communities.

Texas then filed a petition with the Fifth Circuit on February 8, 1984, seeking review of the ICC's partial granting of Greyhound's request.[3] In a unanimous decision issued on April 4, 1985,[4] the court affirmed the ICC's decision, finding the Commission's interpretation of the BRRA to be a permissible one (*see* Pet. App. A-9 to A-10), and the Commission's findings to be "supported by substantial evidence and * * * not arbitrary." Pet. App. A-15. The State of Texas now petitions this Court for a writ of certiorari.

REASONS FOR DENYING THE WRIT

Petitioner seeks review of but one narrow aspect of the Fifth Circuit's unanimous decision upholding the ICC's construction of provisions of the BRRA that by their very terms apply only to a limited class of discontinuance requests. Moreover, the Fifth Circuit's construction of the statutory provision at issue is in full accord with

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[3] Texas also sought a stay of the ICC's decision from the Court of Appeals pending that court's review of the ICC's action. Texas' motion was denied by the court in an order dated March 5, 1985. Pursuant to the terms of the Commission's order, Greyhound has not offered the service here at issue for approximately a year and a half. *See* Pet. App. C-24.

[4] The court's opinion was authored by Judge Tate, in which Judge Hill unqualifiedly joined. Judge Rubin wrote a brief concurrence in which he stated that he, too, "join[ed] fully in this opinion." Pet. App. A-16.

both the plain language of the Act and the decisions of the three other Courts of Appeals that have been called upon to address the issue. Review by this Court of the Fifth Circuit's well-reasoned opinion, then, is simply not necessary, for the following specific reasons:

1. Petitioner does not even argue that this case raises great issues of national moment. Nor could it. The single legal issue presented by Texas' petition is a narrow one applicable only to a limited number of requests to discontinue bus service over older intrastate routes. As Petitioner itself concedes (Pet. at 3), this case is governed by Section 16(e)(1)(A) of the Act, which applies *only* to discontinuance requests involving routes for which the carrier received permission to commence service on or before August 1, 1982—three years ago. All routes granted after that date are governed by what Petitioner calls the "distinct provisions" in Section 16(e)(2)(A). Pet. at 7. Thus, over time, the importance of the statutory provisions under which this case arose will only diminish.

Indeed, while (as would be expected) a flurry of discontinuance requests for pre-1982 routes were filed before the ICC in the months immediately following passage of the BRRA's more liberalized exit procedures, the volume of such exit requests has since slowed to a trickle. Few, if any, of these more recent discontinuance petitions are likely to receive court review; indeed, only a mere handful of exit requests from among the initial wave of petitions were challenged in court, and Greyhound is aware of no other exit cases now in the courts which involve even remotely the issues decided below. Thus, the law relating to intrastate bus route discontinuances is not now a source of significant activity—let alone ferment—among the Circuits, and it is not likely to become one in the future. There is therefore no need for this Court to address the statutory provisions on which this petition is based.

2. That review of the Fifth Circuit's decision by this Court is unnecessary is further underscored by the fact that Petitioner contests but one limited aspect of that decision: the court's sustaining of the ICC's interpretation of Section 16(g)(1) of the BRRA, 49 U.S.C. § 10935(g)(1).[5] The Fifth Circuit ruled that the ICC properly construed Section 16(g)(1) to authorize the Commission to consider the carrier's cost/revenue data under *both* the "public interest" and "unreasonable burden" tests set forth in Section 16(e)(1)(A). *See* Pet. App. A-13. This holding fully comports with the decisions of the three other Circuit Courts that have dealt with exit provisions of the Act. *See Pennsylvania Public Utility Comm'n* v. *United States*, 749 F.2d 841, 848 & 851 (D.C. Cir. 1984) (*"PaPUC"*); *Auville* v. *Interstate Commerce Comm'n*, 747 F.2d 179, 185 (4th Cir. 1984); *Humphrey* v. *United States*, 745 F.2d 1166, 1168-69 (8th Cir. 1984). Thus, despite Petitioner's representations to the contrary, as to the *sole* issue upon which Petitioner seeks review by this Court, the Courts of Appeals are in complete accord that the ICC's interpretation of Section 16(g)(1) is correct.

3. Both the ICC and the court below were clearly correct in their interpretation of the Act. The pertinent part of Subsection (e)(1) of Section 16 sets up two criteria to be considered by the ICC—a "public interest" criterion and an "unreasonable burden" criterion. Subsection (g)(1) provides that the ICC is to assign great weight to cost/revenue data *under Subsection (e)(1)*—not under the "public interest" part of that subsection, or

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[5] Although Petitioner occasionally refers to Section 16(g)(2) in its petition, such references are for comparative purposes only; Petitioner does not appear to challenge the Fifth Circuit's analysis of Section 16(g)(2). Rather, the gravamen of Texas' petition is its objection to the ICC's having considered the economic data referenced in Section 16(g)(1) under both the "public interest" and "unreasonable burden" tests set forth in Section 16(e)(1)(A). *See* Pet. at 7 (arguing that "the public interest standard solely consist[s] of the three elements stated in § 10935(g)(2).")

under the "unreasonable burden" part of that subsection, but under Subsection (e)(1) itself.[6] Therefore, the ICC did precisely what the statute directed it to do and considered the cost/revenue data under both parts of the subsection. Petitioner would have this Court rewrite the Act to make it read: "In making a finding under the unreasonable burden criteria in Subsection (e)(1), the Commission shall accord great weight * * *." Congress *could* have written the statute in that fashion, but did not do so.[7] Neither should the courts. The Act's language, which is of course the ultimate measurement of Congressional intent, thoroughly supports the Fifth Circuit's holding and does not require further examination by this Court in order to be properly construed.[8]

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[6] "(g)(1) In making a finding under subsection (e)(1) of this section, the Commission shall accord great weight to the extent to which * * * revenues are less than * * * variable costs * * *."

[7] The Fifth Circuit indicated that it found Section 16(g)(1) to be "ambiguous" (Pet. App. A-7), despite its ultimate reliance on the plain language of the statute in upholding the ICC's decision. The perceived ambiguity flows from *part* of the Act's legislative history, for the Fifth Circuit undertook an examination of the House and Senate Reports to the BRRA, which offer explanations of bills substantially different not only from each other, but also from the BRRA as passed. However, the Conference Report for the BRRA, the only reliable legislative history, provides ample support for the interpretation of Section 16(g)(1) adopted by both the ICC and the courts. *See* Joint Explanatory Statement of the Committee of Conference, Bus Regulatory Reform Act of 1982, H.R. Rep. Conf. No. 780, 97th Cong., 2d Sess. 47-50 (1982). Hence, Section 16(g)(1) admits of only one interpretation—that given it by the ICC and the Circuit Courts—under both its plain terms and the relevant legislative history.

For the reasons just discussed, Petitioner's reliance on excerpts from the floor debate on the initial House version of the Act to support Petitioner's construction of Section 16(g)(1) (Pet. at 7) is likewise misplaced.

[8] *E.g., Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 337 (1979).

4. In any event, the ICC's interpretation of the Act deserves the deference properly accorded to it by the Fifth Circuit. That is, even if one were to accept the proposition that Section 16(g)(1) is ambiguous by its terms—which we dispute—it is well settled that interpretations of statutes by administrative agencies charged with their implementation are entitled to deference by the courts. *E.g.*, *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council*, 104 S. Ct. 2778, 2781-2782 (1984); *Miller* v. *Youakim*, 440 U.S. 125, 145 n.25 (1979). Having found the ICC's construction of Section 16(g)(1) to be a reasonable and permissible one, the Court of Appeals quite correctly deferred to the Commission and affirmed its decision.[9]

5. Finally, the decision of the court below does not conflict with that of another Circuit. Petitioner's attempts to portray this case as in conflict with the District of Columbia Circuit's decision in the *PaPUC* case are simply inaccurate. As noted above, the *PaPUC* decision explicitly *agrees* with the Fifth Circuit's holding on the *only issue* on which Petitioner seeks review, the correct interpretation of Section 16(g)(1). While the court in *PaPUC* did reverse the ICC's grant of a discontinuance over one of twelve routes at issue in that case, the two principal grounds for reversing the ICC in the *PaPUC* case are not present here. First, there is no allegation that the Commission balanced the "public interest" stand-

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[9] Petitioner's contention that the Fifth Circuit's decision stands for the proposition that an agency interpretation of a statute that the reviewing court considers to be a "clear misread[ing]" of the Act must be deferred to (Pet. at 10) itself misreads the decision below. The Fifth Circuit nowhere in its opinion found the ICC's construction of Section 16(g)(1) to be a "misreading" of the statute; rather, the court found the Commission's interpretation to be a reasonable, permissible one. Hence, the court was not faced with an agency action representing a "clear misreading" of the relevant statute, and so did not address the issue of the proper scope of deference in such a circumstance.

ard *against* the "unreasonable burden" standard under Section 16(e)(1)(A), as the court found it to have done in *PaPUC*. Quite to the contrary, the ICC in this case on several occasions in its decision explicitly and affirmatively found that Petitioner had failed to meet its burden of establishing that *either* of Section 16(e)(1)(A)'s tests for denying an exit request had been met. *E.g.*, Pet. App. at C-2, C-14, C-23.[10]

Second, the court in the *PaPUC* case chastised the ICC for permitting discontinuance based on the mere hypothetical possibility that replacement service might become available to the affected communities. Here, in telling contrast, the Commission explicitly found alternate service either to exist or to have been granted formal permission to commence operations. Pet. App. C-17; C-20 to C-22.[11] In fact, the ICC in the instant case *denied* a large number of Greyhound's requested discontinuances to service points where alternate service was not available. Pet. App. C-21 to C-22. Hence, this second ground for reversal in *PaPUC* is also absent here. There is, therefore, no conflict between the decision below and the decision of any other Circuit Court.

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[10] The Commission did "balance" the numerous factors identified in Section 16(g) of the Act as matters to be considered in making the "public interest" inquiry required under Section 16(e)(1)(A). Pet. App. at C-20. The appropriateness—indeed, the necessity—of such balancing to achieve a public interest determination is not directly disputed by Petitioner; rather, Petitioner characterizes this instance of balancing as "exactly the type of decisionmaking" at issue in the *PaPUC* case. Pet. at 10. As we have shown in the text, however, this assertion is patently incorrect, for the *PaPUC* case involved balancing of the public interest determination *against* the unreasonable burden determination, not balancing of prescribed statutory standards to make a public interest determination in the first place.

[11] As noted *supra* (n. 2), such alternative service has already begun over the main route involved in this case and to most of the service points on that route.

For all of the foregoing reasons, Judges Rubin, Tate and Hill correctly upheld the ICC's decision in this case. Their opinion is in full accord with the plain terms of the BRRA, its legislative history, and the decisions of the other Circuits. This fact, when combined with the very narrow scope of the issue presented for review by Petitioner, renders this petition one that this Court may, and should, readily deny.

Respectfully submitted,

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APPENDIX

LIST OF PRINCIPAL SUBSIDIARIES OF THE GREYHOUND CORPORATION (ARIZONA) AND SUBSIDIARIES AND AFFILIATES OF GREYHOUND LINES, INC. (CALIFORNIA)

Parent-subsidiary or affiliate relationships are shown by marginal indentation. State, province or country of incorporation and ownership percentage are shown in parentheses following each name, except that no ownership percentage appears for 100 percent owned subsidiaries. If ownership is divided between two affiliates, the ownership percentage of both is combined and is not in parentheses, and in such cases the company is listed as a subsidiary or affiliate of the company holding the highest percentage of stock. The list does not include companies in which the direct or indirect interest of The Greyhound Corporation is less than 20 percent.

THE GREYHOUND CORPORATION (ARIZONA)

(PARENT)

TRANSPORTATION GROUP

GREYHOUND LINES, INC. (California)

Greyhound Bus Depot of Atlanta, Inc. (Georgia) (87%)
Greyhound Lines of Canada Ltd. (Canada) (68%)
Motor Coach Industries Limited (Manitoba) (68%)*
Greyhound-Taseco Saudi Arabia Ltd. (Saudi Arabia) (40%)
Jefferson Lines Holding Company (Minnesota) (40%)
Kerrville Bus Company, Inc. (Texas) (40%)

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* Motor Coach Industries is a part of the Transportation Manufacturing Group, but is a subsidiary of Greyhound Lines, Inc.

Southeastern Stages, Inc. (Georgia) (40%)
Springfield Bus Terminal Corporation
(Massachusetts) (32%)
Union Bus Station of Oklahoma City, Oklahoma
(Oklahoma) (20%)
Wilmington Union Bus Station Corporation
(North Carolina) (25%)
Texas, New Mexico & Oklahoma Coaches, Inc.
(Texas) (98%)

TRANSPORTATION MANUFACTURING GROUP

Motor Coach Industries, Inc. (Delaware)
Transportation Manufacturing Corporation (Delaware)
Universal Coach Parts, Inc. (Delaware)

CONSUMER PRODUCTS GROUP

Armour-Dial, Inc. (Delaware)
Armour Handcrafts, Inc. (Arizona)
Armour International Company (Arizona)
Purex Corporation (Delaware)

FINANCIAL GROUP

Greyhound Computer Corporation (New York)
Greyhound Financial & Leasing Corporation AG
(Switzerland)
Greyhound Leasing & Financial Corporation (Delaware)
Greyhound Realty Corporation (Arizona)
MCI Acceptance Corp. (Delaware)
Verex Corporation (Arizona)

SERVICES AND FOOD SERVICE GROUP

Aircraft Service International, Inc. (Delaware)
Consultants & Designers Inc. (Delaware)
Dispatch Services, Inc. (Florida)
Faber Enterprises, Inc. (Delaware)
Florida Export Tobacco Co. Inc. (Florida)

Greyhound Exhibitgroup Inc. (Delaware)
Greyhound Exposition Services, Inc. (Nevada)
Greyhound Food Management, Inc. (Michigan)
    Glacier Park, Inc. (Arizona) (80%)
    Restaura, S.A. (Belgium)
Greyhound Support Services, Inc. (Delaware)
Post Houses, Inc. (Delaware)
Premier Cruise Lines, Ltd. (Cayman Islands)
Travelers Express Company, Inc. (Minnesota)